No. 18419

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

OHIO BRASS COMPANY, THE OHIO BRASS COMPANY, GENERAL ELECTRIC COMPANY, LAPP INSULATOR COMPANY, INC., THE PORCELAIN INSULATOR CORPORATION, I-T-E CIRCUIT BREAKER COMPANY, A. B. CHANCE COMPANY, MCGRAW-EDISON COMPANY, H. K. PORTER COMPANY, INC.,

Appellants,

vs.

SOUTHERN CALIFORNIA EDISON COMPANY,

Appellee.

ANSWERING BRIEF OF APPELLEE.

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ANSWERING BRIEF OF APPELLEE.

Statement of the Case.

The parties to this appeal entered into "Agreed Statement on Appeal from Interlocutory Order dated January 15, 1963 (Statute of Limitation)." Therein it was stipulated that such Agreed Statement should be certified to this court and constitute the record on this appeal. References in this brief to the record on appeal are to the Agreed Statement.

The complaint herein [R. 8-20] (in two counts) alleges that the appellants, manufacturers of insulators, engaged in an unlawful combination and conspiracy in restraint of trade in such equipment. The first count

alleges a conspiracy beginning at least as early as 1948 and continuing until on or about February 17, 1960 [Par. 7, R. 11]; the second count alleges that the conspiracy began at least as early as 1955 and continued until on or about February 17, 1960 [Par. 15, R. 18].

In summary, the complaint includes the following allegations pertinent to this appeal:

> That said combination and conspiracy consisted of a continuing agreement to fix and maintain prices for the sale of insulators, to enforce adherence to these prices for the sale of insulators through agents, jobbers and wholesalers, and to quote to various public agencies, in submitting sealed bids to such agencies, only the prices for insulators as agreed upon and fixed [Par. 8, R. 11].
>
> That during the conspiracy appellee purchased such equipment from one or more of appellants and from other suppliers, that by reason of the conspiracy appellee paid prices for such equipment substantially in excess of those which appellee would have paid under conditions of unrestricted competition in the absence of said conspiracy, and that appellee was damaged at least to the extent of such excessive payments [Pars. 11, 12, R. 15-16].
>
> That on February 17, 1960, criminal and civil proceedings were instituted in the United States District Court for the Eastern District of Pennsylvania against the appellants herein and others for the purposes, respectively, of punishing appellants and others for the violation of Section 1 of the Sherman Act resulting from said conspiracy, and

of restraining the violation of Section 1 of the Sherman Act resulting from said conspiracy [Pars. 9, 10, R. 14 and 15].

That appellee did not learn of said conspiracy until after the commencement of the criminal and civil proceedings by the United States and the reporting thereof in the public press; that appellee did not discover and could not have discovered by the exercise of reasonable diligence the existence of such combination and conspiracy for the reason that such conspiracy was entered into by appellants secretly [Par. 13, R. 16-17].

That appellants actively and fraudulently concealed the existence of such conspiracy by conduct which included meeting secretly and agreeing upon prices of insulators and the submission of price quotations to supply insulators in such manner that it would appear that the prices were quoted competitively, and each appellant representing to appellee that the prices quoted by such appellant to appellee were quoted without any connection with any other manufacturer of insulators and were fair and without collusion or fraud [Par. 13, R. 16-17].

Appellants' motions below for final partial summary judgment, and to strike, were based upon the contention that Section 4B of the Clayton Act barred claims herein based upon purchases by appellee more than four years prior to the date of the filing of the indictment by the United States in the aforesaid criminal action.

Said motions raised the question which is here on appeal, namely, whether fraudulent concealment suspends the running of the statute of limitations set forth in Sections 4B and 5(b) of the Clayton Act (15 U. S. C. Sections 15(b) and 16(b)).

The District Court, below, ruled that fraudulent concealment does toll the statute of limitations, setting forth its reasons in Memorandum of Decision dated January 8, 1963 [R. 56-77]. Pursuant to such Memorandum of Decision order was entered January 15, 1963, denying appellants' motions [R. 78], and this appeal was prosecuted from such order.

ARGUMENT.

I.

Preface.

This action is one of 125 actions presently pending in the United States District Court for the Southern District of California, Central Division, against appellants and others, based upon matters involved in the civil and criminal proceedings brought by the United States against electrical equipment manufacturers in the United States District Court for the Eastern District of Pennsylvania at various times in 1960 [R. 3]. It is one of about 1800 such suits filed in the United States, based upon matters involved in said civil and criminal proceedings in the Eastern District of Pennsylvania.[1]

In those suits, the question raised by this appeal has been brought up and decided in nine District Courts to date and in the Courts of Appeal for the Second, Seventh, Eighth and Tenth Circuits. These four Courts of Appeal each held that fraudulent concealment tolls the Statute of Limitations found in Sections 4B and 5(b) of the Clayton Act.[2]

Petitions were filed with the United States Supreme Court for writs of certiorari directed to the Second and

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[1]See, *Public Service Co. of New Mexico v. General Electric Company, et al.*, 315 F. 2d 306 (10th Cir., March 15, 1963), at p. 309; *Allis-Chalmers Manufacturing Co., et al. v. Commonwealth Edison Co., et al.*, 315 F. 2d 558 at 560 (7th Cir., March 29, 1963); Memorandum of Decision, herein [R. 69, line 16].

[2]*City of Kansas City, Mo. v. Federal Pacific Electric Co.*, 310 F. 2d 271 (8th Cir., 1962); *Atlantic City Electric Co. v. General Electric Co.*, 312 F. 2d 236 (2nd Cir., 1962); *Public Service Co. of New Mexico v. General Electric Co.*, 315 F. 2d 306 (10th Cir., 1963); *Allis-Chalmers Manufacturing Co., et al. v. Commonwealth Edison Co., et al.*, 315 F. 2d 558 (7th Cir., 1963).

Eighth Circuits in the above mentioned cases. These petitions were denied on May 13, 1963.[3]

The decisions of the four Courts of Appeal were based on the following reasoning:

1. There is a long standing Federal rule to the effect that fraudulent concealment of the existence of a cause of action tolls the Statute of Limitations. This rule has been plainly stated by the United States Supreme Court in the following three cases:

Holmberg v. Armbrecht, 327 U. S. 392 (1946);

Exploration Co. v. United States, 247 U. S. 435 (1918);

Bailey v. Glover, 21 Wall. (88 U. S.) 342 (1874).

2. In *Holmberg v. Armbrecht,* the Supreme Court stated that the fraudulent concealment rule is an equitable doctrine which ". . . is read into every federal statute of limitation" (327 U. S. at 397).

3. The fraudulent concealment rule is applicable to the Clayton Act statute of limitations, unless Congress clearly indicated that it should not be so applied.

4. There is nothing in the language of Sections 4B and 5(b) of the Clayton Act negating application of the fraudulent concealment rule.

5. The legislative history of Sections 4B and 5(b) at the least makes it clear that Congress did

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[3]C. C. H. U. S. Supreme Court Bulletin, May 13, 1963, pp. 1585, 1586.

not intend to prevent application of the fraudulent concealment rule, and, in the judgment of the Court of Appeals for the Eighth Circuit, indicated an expressed intent that the rule should apply.

6. Fraudulent concealment tolls the statute of limitations found in Sections 4B and 5(b) of the Clayton Act.

That the foregoing reasoning is sound and requires affirmance of the ruling by the District Court herein, will be demonstrated in the argument which follows.

II.

The Fraudulent Concealment Rule Is of Long Standing and Is Read Into Every Federal Statute of Limitations.

Federal and State courts have for many years applied the rule that fraudulent concealment of a cause of action tolls the statute of limitations. This rule was correctly applied by the District Court below.

The reasoning of the District Court, as well as that of the four Courts of Appeal which have passed upon this question in the currently pending electrical equipment conspiracy cases, is correctly based on *Holmberg v. Armbrecht,* 327 U. S. 392 (1946).

Holmberg v. Armbrecht was an action in equity by creditors of a joint stock land bank to enforce the statutory liability imposed upon shareholders of the bank by the Federal Farm Loan Act. Suit was barred by the statute of limitations unless the fraudulent concealment doctrine was applicable. The plaintiffs urged that the suit was not barred because they had been prevented from bringing the action within the limitation period

by reason of concealment of the identity of the true owner of certain shares of the bank. The Supreme Court, in reversing a contrary ruling of the Circuit Court of Appeals, ruled that the fraudulent concealment doctrine did permit maintenance of the action, stating that "equity will not lend itself to such fraud and historically has relieved from it."

The court also stated in *Holmberg v. Armbrecht,* with reference to the fraudulent concealment rule there applied, that *"This equitable doctrine is read into every federal statute of limitation"* (p. 397, emphasis added). It is this directive of the Supreme Court which requires that the ruling of the District Court, below, be affirmed. As stated by the Court of Appeals for the Tenth Circuit in *Public Service Co. of New Mexico v. General Electric Co., supra.:*

> "The contention is made that the quoted phrase is dictum to which the lower courts are not required to yield. Without exploring the intricate distinctions between dictum and language necessary to decision, we conclude that we must recognize the clear, direct, explicit, and unqualified statement of the Supreme Court." (315 F. 2d at p. 310, n. 6).

The fraudulent concealment rule is grounded in an equitable principle which has been characterized by the United States Supreme Court as "Deeply rooted in our jurisprudence . . ." and "frequently . . . employed to bar inequitable reliance on statutes of limitations . . .", namely, the rule that "no man may take advantage of his own wrong."

> *Glus v. Brooklyn Eastern District Terminal,* 359 U. S. 231, 232-233 (1959).

The fraudulent concealment rule has been part of the law of many American jurisdictions since an early date (see, Dawson, *Fraudulent Concealment and Statutes of Limitation,* 31 Mich. L. Rev. 875 (1933)). Fraudulent concealment was first applied as a federal rule in *Bailey v. Glover,* 21 Wall. (88 U. S.) 342 (1874). There, the Supreme Court took note of a conflict in state court decisions as to whether or not the rule would be applied to actions in law as well as to actions in equity, and determined that the rule should be applied in both types of actions. The statute of limitations involved in *Bailey v. Glover* was similar to Section 4B of the Clayton Act which is here considered:

Bankrupt Act of 1867, §2:

> ". . . no suit at law or in equity shall in any case be maintainable by or against such assignee, . . . in any court whatsoever, unless the same shall be brought within two years from the time of the cause of action accrued for or against such assignee."

Clayton Act, Sec. 4B (15 U. S. C. §15b):

> "Any action to enforce any cause of action under Sections 15 or 15a of this title shall be forever barred unless commenced within four years after the cause of action accrued."

The unsuccessful party in the *Bailey* case, urged, as is here urged by appellants, "that the statute is imperative, admitting of no exceptions." (21 Wall. (88 U. S.) 342, 346). The Supreme Court rejected this argument stating that the concealment rule "has been very often applied by the courts under proper circumstances, in

mitigation of the strict letter of general statutes of limitation" (21 Wall. 342, 347). The argument which was rejected in 1874 in the *Bailey* case should also be rejected here.

Since *Bailey v. Glover,* the United States Supreme Court has applied the fraudulent concealment rule in two other cases under the Bankruptcy Act.

Rosenthal v. Walker, 111 U. S. 185 (1884);

Traer v. Clews, 115 U. S. 528 (1885);

and in two actions by the United States to cancel land patents.

Exploration Co. v. United States, 247 U. S. 435 (1918);

United States v. Diamond Coal & Coke Company, 255 U. S. 323 (1921).

As noted above, most recent application of the fraudulent concealment rule by the United States Supreme Court was in *Holmberg v. Armbrecht, supra,* deemed authoritative by the four Courts of Appeal which have passed on this question.

It is important to note that *Holmberg v. Armbrecht* was not grounded in fraud. It was an action to enforce *statutory* shareholders liability. The case will not support appellants' endeavor to characterize it as a case involving undiscovered fraud (see below).

Appellants also endeavor to avoid the force of the *Holmberg* case by erroneously characterizing it as an action brought to set aside a fraudulent conveyance. The facts of the *Holmberg* case refute such a characterization. The action was one for money based on

statutory liability. The plaintiff had prevailed in the trial court recovering a judgment for $10,000.00. The Circuit Court of Appeals reversed on the statute of limitations.[4] The Supreme Court reversed the Circuit Court on the ground that fraudulent concealment tolls the statute of limitations. The Court of Appeals for the Seventh Circuit correctly characterized the *Holmberg* case as follows:

> "In *Holmberg,* the Supreme Court again affirmed the teachings of *Bailey* and *Exploration,* and Mr. Justice Frankfurter made a statement quoted in almost every subsequent opinion on this subject: 'This equitable doctrine [fraudulent concealment] is read into every federal statute of limitations.' "[5]

The decision of the District Court herein was required by *Holmberg v. Armbrecht,* and should be affirmed.

III.

The Fraudulent Concealment Rule Has Been Consistently Applied by the Federal Courts in Private Antitrust Actions in This Circuit and Elsewhere.

Prior to 1955 the Clayton Act did not contain a limitation period and federal courts borrowed and applied state statutes of limitation. Applicability of the fraudulent concealment rule was recognized in a number of private antitrust actions in the federal courts

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[4]*Holmberg v. Armbrecht,* 150 F. 2d 829 (2nd Cir.. 1945).

[5]*Allis-Chalmers Mfg. Co. v. Commonwealth Edison Co.,* 315 F. 2d at 562, n. 7.

beginning with *American Tobacco Co. v. People's Tobacco Co.,* 204 Fed. 58 (5th Cir. 1913) and including three cases in this court:

Foster & Kleiser Co. v. Special Site Sign Co., 85 F. 2d 742 (9th Cir. 1936) cert. den. 299 U. S. 613;

Burnham Chemical Co. v. Borax Consolidated, 170 F. 2d 569 (9th Cir. 1948) cert. den. 336 U. S. 924;

Suckow Borax Mines Consol. v. Borax Consolidated, Limited, 185 F. 2d 196 (9th Cir. 1950), cert. den. 340 U. S. 943, rehear. den. 341 U. S. 912.

Courts in other circuits have likewise affirmed that the fraudulent concealment rule is applicable in private treble damage actions. In *Crummer Co. v. Du Pont,* 117 F. Supp. 870 (N. D. Fla. 1954), the District Court had before it a private treble damage action under Section 4 of the Clayton Act in which the doctrine of fraudulent concealment was urged by the plaintiffs. The court found that the facts alleged by plaintiffs were not sufficient to satisfy the fraudulent concealment rule but affirmed the applicability of that rule in the following language:

> "Plaintiffs, while citing many cases, rely heavily upon *Bailey v. Glover,* 21 Wall. 342, 88 U. S. 342, 22 L. Ed. 636, and *American Tobacco Co. v. People's Tobacco Co.,* 5 Cir., 204 F. 58, as being controlling upon the court in this case. There is no doubt about the doctrine announced by the courts in *Bailey v. Glover* and *American Tobacco Co. v. People's Tobacco Co.* being the law today.

> These cases, however, are not controlling here. This court held in its order of October 26, 1953 that the doctrine of fraudulent concealment applies in private civil anti-trust actions and is applicable in this case, if sufficiently alleged in the complaint. What the court now finds and holds is that the complaint . . . fails to allege sufficient facts to make an issue on the question of fraudulent concealment, . . ." (p. 876).

On appeal the court of appeals for the 5th Circuit also held that the fraudulent concealment rule was applicable and reversed the district court's ruling that the plaintiff's allegations were insufficient to raise the issue of fraudulent concealment.

> *Crummer Co. v. Du Pont,* 223 F. 2d 238 (5th Cir. 1955).

In a second appeal the district court was again reversed after having directed a jury finding in favor of the defendants for failure of proof on the fraudulent concealment issue.

> *Crummer Co. v. Du Pont,* 255 F. 2d 425 (5th Cir. 1958).

In *Winkler-Koch Engineering Co. v. Universal Oil Products Co.,* 100 F. Supp. 15, 29 (S. D. N. Y. 1951), the doctrine of fraudulent concealment was invoked to permit the maintenance of a private treble damage action otherwise barred by a state statute of limitations.

The fraudulent concealment rule has been applied in other private antitrust actions.

Klein v. Lionel Corp., 130 F. Supp. 725 (D. Del. 1955);

Norman Tobacco & Candy Co. v. Gillette Safety Razor Co., 197 F. Supp. 333 (N. D. Ala. 1960).

At least three cases, prior to the electrical equipment cases, applied the rule to the federal four-year limitation of Section 4B of the Clayton Act.

Philco Corp. v. R.C.A., 186 F. Supp. 155 (E. D. Pa. 1960);

Dovberg v. Dow Chemical Co., 195 F. Supp. 337 (E. D. Pa. 1961);

Gaetzi v. Carling Brewing Co., 205 F. Supp. 615 (E. D. Mich. 1962).

In most instances where a state statute of limitations was borrowed the state law included the fraudulent concealment rule. This was the case in the three Ninth Circuit cases where reference was had to the California law. In at least one case involving application of a state statute of limitation to a Clayton Act case, the state law did not permit tolling for fraudulent concealment and the Court of Appeals for the 2nd Circuit nevertheless held that fraudulent concealment tolled the state limitation period.

Moviecolor Limited v. Eastman Kodak Company, 288 F. 2d 80 (2d Cir. 1961), cert. den. 368 U. S. 821.

In any event, the issue now before this court is whether the *federal* fraudulent concealment rule must be applied to Sections 4B and 5(b) of the Clayton Act on the authority of *Holmberg v. Armbrecht,* and for the reasons given by the four Courts of Appeal which have heretofore ruled on this issue. This court is no longer called upon to borrow the statute of limitations from California law. Hence, the analysis of *Kimball v. Pac. Gas & Elec. Co.,* 220 Cal. 203 (1934), in appellants' brief is not pertinent to this appeal.[6]

Appellants erroneously urge that the federal cases, including *Holmberg v. Armbrecht,* established no more than a rule of tolling for undiscovered fraud. As noted above, *Holmberg v. Armbrecht* was not grounded in fraud but rather was an action to enforce a statutory shareholder liability in which the statute of limitation was tolled because of concealment of the cause of action. The proper construction of *Holmberg v. Armbrecht* was stated as follows in the opinion of the District Court below [R. 76-77]:

> "It is clear that the basis of liability was the mere ownership of shares of stock, and the only fraud practiced by defendant was the concealment

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[6]It should be pointed out, however, that appellants misstate the California fraudulent concealment rule in their discussion of the *Kimball* case (Appellants' Brief, pp. 12-15). Appellants argue that there must be a finding of (1) concealment and (2) circumstances which imposed an affirmative duty to disclose. The *concealment* in the *Kimball* case consisted of *silence* where there was a duty to disclose. This Court properly construed the *Kimball* case in *Foster & Kleiser Co. v. Special Site Sign Co.,* where this Court said: "Under that decision [*Kimball v. Pac. Gas & Elec. Co.*] when fraud is not the gravamen of the action, in order to toll the applicable statute of limitations, two factors must be present: (1) Fraudulent concealment; (2) Non-discovery, that is, absence of facts that would put a party upon notice of the cause of action." 85 F. 2d at 752.

of the facts on which his liability was grounded. Thus the Supreme Court held, in *Holmberg v. Armbrecht,* that the federal doctrine of fraudulent concealment applies not only in actions based upon fraud, but also where there is fraudulent concealment of facts which form the foundation for other types of causes of action."

The District Court herein correctly ruled that fraudulent concealment tolls the statute of limitations found in Sections 4B and 5(b) of the Clayton Act.

IV.

Congress Did Not Intend by the Enactment of Section 4B of the Clayton Act to Prevent the Continued Application of the Fraudulent Concealment Rule.

At the time of the adoption by Congress (1955) of a uniform limitations period for the Clayton Act, the doctrine of fraudulent concealment was "read into every federal statute of limitation" in accordance with the rule of *Holmberg v. Armbrecht,* 327 U. S. 392 (1946). The fraudulent concealment rule at that time was in effect in a majority of states. Courts had applied the doctrine to antitrust damage actions both before *Holmberg v. Armbrecht*[7] and subsequent to the *Holmberg* case.[8]

Nothing in the legislative history indicates that Congress intended to change this long standing rule. Two statements of the United States Supreme Court in con-

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[7]*American Tobacco Co. v. Peoples Tobacco Co., supra; Foster & Kleiser Co. v. Special Site Sign Co., supra.*

[8]*Winkler-Koch Engineering Co. v. Universal Oil Products Co.,* 100 F. Supp. 15 (S.D. N.Y. 1951).

nection with other statutes of limitation clearly illustrate that the United States Supreme Court would require a very clear expression of Congressional intent (not found in connection with Section 4B) to eliminate application of the fraudulent concealment doctrine to a federal statute of limitations. In *Exploration Co. v. United States,* 247 U. S. 435 (1918), the Supreme Court stated with respect to a federal statute of limitations application in suits to vacate land patents:

> "When Congress passed the act in question the rule of *Bailey v. Glover* was the established doctrine of this court. It was presumably enacted with the ruling of that case in mind. We cannot believe that Congress intended to give immunity to those who for the period named in the statute might be able to conceal their fraudulent action from the knowledge of the agents of the government" (247 U. S. at 449).

To the same effect, in *Glus v. Brooklyn Eastern District Terminal,* 359 U. S. 231 (1959), the Supreme Court referred to the principle that a person may not avail himself of an advantage secured by his representations where it would be "against equity and good conscience" and stated:

> "We have been shown nothing in the language or history of the Federal Employers' Liability Act to indicate that this principle of law, older than the country itself, was not to apply in suits arising under that statute" (359 U. S. at 234).

A. The Legislative History Argued by Appellants Shows That Prior Bills Are Irrelevant.

In an effort to find a Congressional intent to negate fraudulent concealment, where none existed, appellants argue certain Congressional bills proposed in 1949 and 1950 which would have added a period of limitation to the Clayton Act but would have provided that, *without regard to concealment,* the period did not commence running in the case of a conspiracy until discovery by the plaintiff of the *facts* necessary to prove the conspiracy.

Extended discussion of these bills is unnecessary. The fact that they embodied a concept entirely different from that of the fraudulent concealment rule and were introduced and rejected at least four years prior to the enactment of Section 4B of the Clayton Act demonstrates the irrelevancy of the legislative history concerning those bills.

The first of the earlier bills was S. 1910, 81st Congress, 2d Session, introduced May 20, 1949. This bill would have provided relief for a party in the position of the plaintiff in *Burnham Chemical Co. v. Borax Consolidated, Ltd.,* 170 F. 2d 569 (9th Cir. 1948), *cert. denied,* 336 U. S. 924 (1949). In *Burnham,* this Court acknowledged the fraudulent concealment rule but held that the statute of limitations had not been tolled because the defendants had not concealed the conspiracy and the plaintiffs knew of it.

S. 1910 would have allowed a plaintiff in a conspiracy case to toll the statute of limitations merely on the basis of his own failure to *discover* the facts on

which he relied for proof of the conspiracy. Congress was acquainted with the *Burnham* case; among other information, Thurman Arnold who had been Mr. Burnham's lawyer testified during the hearings on S. 1910:

> "Under the Burnham case we have the rule that if the plaintiff has good reason to believe that there has been a conspiracy against him, the statute commences to run regardless of whether he has the facts to back up that belief" (Hearings Before a Subcommittee of the Senate Committee on the Judiciary, 81st Cong., 1st Sess., pt. 1 at 4 (1949)).

A later version of the statute of limitations was introduced as H. R. 3408, 82d Congress, 1st Session. This bill omitted the "discovery" provision which had been included in S. 1910. Congressman Patman continued to argue for the inclusion of a "discovery" provision. The following exchange is in the record between Mr. Stevens and Mr. Patman:

> "Mr. Stevens. Congressman Patman, I notice you referred to the Burnham Chemical case in your prepared statement.
>
> Mr. Patman. Yes, sir.
>
> Mr. Stevens. And that was the only case that you referred to in connection with your suggested discovery provision.
>
> Mr. Patman. Yes, sir.
>
> Mr. Stevens. I was wondering if it was called to the attention of the select committee which considered this matter that in that case the court specifically found—

That during the time from May 17, 1929, to October 10, 1939, appellant knew, or had good cause and reason to believe, that its business had been theretofore damaged and that it had been driven out of business by acts of appellees which violated the antitrust laws of the United States; that appellant was, during this period, convinced that it had a good case against appellees for the damage it had then suffered and that its attorneys so believed and so advised it.

I wonder if that was called to the attention of your committee?

Mr. Patman. It wasn't called to my attention. I don't know whether it was called to the attention of the staff or not, or to the attention of the other members.

Mr. Stevens. The court of appeals also refers to the discussion of the district court, which examines the evidence at great length, to show that there was no concealment; that this plaintiff did know the facts all during this period. For the record, the citation on that is 170 Federal 2d, page 569, and footnote 4 refers to the discussion in the district court at great length. The portion I read is on page 578. The reason I thought it was important to refer to the opinions is that apparently that is the only case that has been mentioned in any of these hearings where anyone has pointed out, or tried to point out, that there is need for a discovery provision" (Hearings Before the Subcommittee on Study of Monopoly Power of the House Committee on the Judiciary on H. R. 3408 82d Cong., 1st Sess., ser. 1, pt. 3, at 101 (1951)).

It is clear from the foregoing that Congress was aware that the purpose of the "discovery" provisions urged by Mr. Patman was to permit a plaintiff such as Burnham to recover notwithstanding inability to show fraudulent concealment.

The appellants argue that the fraudulent concealment rule is the same as the rule which Congress considered and rejected in 1949 and 1950. To the contrary, it is clear that the fraudulent concealment rule is a distinct doctrine and may not be confused with the "discovery rule" which Congressman Patman desired to apply to Clayton Act suits for the benefit of parties such as Burnham Chemical Co. who were unable to meet the requirements of the fraudulent concealment rule.

The distinction between the rule urged by Congressman Patman and which was embodied in some of the bills offered in 1949 and 1950 has been made in the cases. The fraudulent concealment rule applies to concealment of the plaintiff's cause of action; the "discovery" rule which was urged upon Congress in 1949 and 1950 would have applied to the plaintiff's failure to discover the facts upon which the plaintiff relied to prove his cause of action. The *Burnham* case pointed out that "mere failure by a defendant to disclose to a plaintiff the existence of the *facts* does not constitute 'fraudulent concealment' of the *cause of action* . . ." (170 F. 2d at 577, emphasis added). This distinction denied relief to Mr. Burnham. The same distinction was pointed out in the *Moviecolor* case, the court saying "mere ignorance of evidence on which to establish a claim is not enough . . ." 288 F. 2d at 87. In

Tinkoff v. United States, 211 F. 2d 890, 892 (7th Cir. 1954), the court made the following statement in distinguishing *Exploration Co. v. United States* wherein the fraudulent concealment rule had been applied:

> "Here, plaintiff has long had knowledge of the alleged wrong or fraud which he claims was perpetrated upon him but it is only recently, according to his assertion, that he has been able to obtain proof in support thereof. This distinction alone renders the case relied upon inapplicable to the instant situation."

The Court of Appeals for the Eighth Circuit had no difficulty distinguishing the "discovery" rule from the fraudulent concealment rule. That court said in *City of Kansas City v. Federal Pacific Electric Co.:*

> "In part defendants' legislative history argument is based on the premise that the failure of Congress to enact proposed discovery provisions which were included in some of the prior bills, compellingly demonstrates congressional intent that the doctrine of fraudulent concealment should not be read into §4B. This argument necessarily encompasses the proposition that 'discovery' is synonymous in meaning to and must be equated with the doctrine of fraudulent concealment. Aside from the questionable import that the rejection of prior bills may have in determining congressional intent as to subsequently enacted legislation, a question we do not further explore, we are satisfied that there is a marked difference in tolling the statute of limitations because of the failure to discover, and tolling the limitation period because the parties

> who engaged in unlawful conduct (conspiracy or combination) are successful through affirmative action, in concealing the cause of action itself." (310 Fed. 2d at 278).

The Court of Appeals for the Tenth Circuit made the same distinction:

> "Defendants argue further that the rejection by Congress of the bills tolling the period of limitations until discovery shows an intent to reject the Holmberg principle. Again we do not agree. Delay in discovery differs from wrongful concealment." (315 F. 2d at 310).

Clearly Congress had not rejected the fraudulent concealment rule in 1949 and 1950 and Congress' failure to pass Senate Bill S. 1910 or other bills, has no relevance to the intention of Congress when it enacted Section 4B.

B. The Legislative History of Section 4B Shows That Congress Intended the Continued Application of the Fraudulent Concealment Rule to Treble Damage Actions.

Section 4B was enacted through H. R. 4954, 84th Congress, 1st Session (1955).

Holmberg v. Armbrecht, supra, and other authorities previously discussed, make it clear that Congressional silence with respect to the doctrine of fraudulent concealment left that rule applicable to Section 4B as well as to other federal statutes of limitation. However, there are affirmative statements which show that Congress intended the fraudulent concealment rule to be applicable to Section 4B.

The pertinent references are found in the House debate on the bill. Congressmen Celler, sponsor of the bill, explained its purpose; at one point Congressman Patman interrupted and the following exchange between them took place:

> "Mr. Patman. Does that 4 years apply to conspiracy cases? Suppose there is a conspiracy, and it is 10 years before the conspiracy is known.
>
> Mr. Celler. In the case of conspiracy or fraud, the statute only runs from the time of discovery.
>
> Mr. Patman. From the time of the discovery?
>
> Mr. Celler. In conspiracy cases and cases of fraud.
>
> Mr. Patman. And it is not the object or intention to change that at all?
>
> Mr. Celler. That is correct" (101 Cong. Rec. 5129 (1955)).

Congressman Keating, also a member of the Judiciary Committee, then added a brief explanation of the bill and Congressman Patman raised the same question again as follows:

> "Mr. Patman. Does the gentleman agree with the chairman that the 4-year limitation does not commence to apply in a conspiracy case until the conspiracy becomes known?
>
> Mr. Keating. I would want to have the law on that checked by the counsel for our committee. I have an impression that there have been decisions under the present conspiracy statute, which is not in any way interfered with by this legislation, to the effect that the statute of limitations does not begin to run until discovery of the conspiracy. But

I would not want to make a positive assertion to the gentleman on that point without further investigation of the law.

Mr. Patman. Notwithstanding the fact that the discovery was made years later?

Mr. Keating. I would be happy to yield to the chairman of the committee, who may have investigated that precise point.

Mr. Celler. Yes, I have. The statute only said from the time of discovery in that kind of case. The basis for my conclusion in that regard is the cases themselves. There are innumerable cases on that score.

Mr. Keating. I am happy to have that enlightenment" (101 Cong. Rec. 5130 (1955)).

Further in the discussion the following exchange took place between Mr. Patman and Mr. Celler.

"Mr. Patman. Mr. Chairman, after the word 'accrued' in line 7, page 2, I have an amendment prepared to include the phrase 'and became known' so as to make it clear that the cause of action or that limitation would not commence to run against a cause of action until it is discovered, until it became known, and, therefore, I would like to ask the chairman of the committee this question: Is it your understanding, Mr. Chairman, that the cause of action will not commence to run, that limitation will not commence to run on the cause of action until after it is discovered, 4, 6, or 10 years hence?

Mr. Celler. The statute of limitations will start running from the time the action accrues, not

from the time of discovery. If you make it time of discovery, then you practically have no statute of limitations at all. An action could have accrued and the person aggrieved might not have heard of it for 20 years. Under the suggested amendment he would have a right to bring an action after 20 years, after the evidence will have been lost, and the defendant would be put in a rather deplorable situation in that regard. We provide that the 4-year statute shall start to run from the time of the accrual of damages, from the time the wrong was done, not from the time of discovery.

Mr. Patman. Even in the case of fraud or conspiracy?

Mr. Celler. No. In the case of fraud or conspiracy the statute of limitation only runs from the time of discovery.

Mr. Patman. That is the point I wanted to make sure of. You are not attempting to change that particular part of it?

Mr. Celler. Not at all.

Mr. Patman. Mr. Chairman, the proposal for inserting the words 'and became known' after the word 'accrued' in line 7, page 2, is to emphasize and make clear in the law that the period of limitations shall not commence to run until at least covert wrongs have been discovered. We should make certain that in enacting a uniform Federal statute of limitation we will not be acting to limit the damage period to 4 years, even though a monopolistic conspiracy may have lasted for 10 years before the victim even knew of its existence. Per-

haps the amendment I propose will not insure fully against such unjust result, but it will serve to improve the provision which has been presented in H. R. 4954 in making certain that the action is not barred until a period of 4 years after the victim learned of the existence of his cause of action" (101 Cong. Rec. 5132-33 (1955)).

The exchange between Mr. Patman and Mr. Celler makes it clear that it was the intent of Congress to leave the fraudulent concealment doctrine applicable to actions under the Clayton Act. Appellants, below, argued that Congressman Celler's reference to "discovery" was in error because it could only have reference to the "discovery rule" rejected by Congress in 1949 and 1950. Clearly this is not the case. Congressman Celler was answering Mr. Patman (who had argued for the "discovery rule") with the statement that "fraud or conspiracy" would not be within the time bar of Section 4B. It is clear from Mr. Patman's remark "You are not attempting to change that particular part of it" that he understood Mr. Celler to be saying that the statute of limitations would *continue* to run from the time of discovery under Section 4B in those cases in which the statute had commenced upon discovery *prior* to the adoption of Section 4B. This could only have reference to the fraudulent concealment rule.

The remarks of Congressman Celler explaining the bill's effect, he being its sponsor and the Chairman of

the Judiciary Committee, are entitled to great weight. Such statements have been held to be authoritative in a number of cases.

Mitchell v. Kentucky Finance Co., 359 U. S. 290 (1959);

Duplex Printing Press Co. v. Deering, 254 U. S. 443 (1921);

United States v. St. Paul, Minneapolis & Manitoba Ry., 247 U. S. 310 (1918);

Ideal Farms, Inc. v. Benson, 288 F. 2d 608 (3d Cir. 1961).

As indicated by *Federal Trade Commission v. Anheuser Busch, Inc.,* 363 U. S. 536 (1960), statements such as Congressman Celler's are not always controlling, but the statement disregarded in the *Anheuser Busch* case was ignored in part at least because it was considered "ambiguous and misleading" (363 U. S. at 553, footnote 24). Congressman Celler's remarks were prefectly clear:

> "Mr. Patman. That is the point I wanted to make sure of. You are not attempting to change that particular part of it?
>
> Mr. Celler. Not at all."

The Eighth Circuit saw the weight of Mr. Celler's remarks:

> "Defendants would have us disregard the statements made by Chairman Celler and assert that debate on the floor of Congress cannot be used to determine the congressional intent. *Federal Trade Commission v. Anheuser-Busch, Inc.* (1960), 363 U. S. 536, 553; *Pennsylvania R.R. Co. v. Inter-*

national Coal Mining Co. (1913), 230 U. S. 184, 198-199. We take no issue with these cases but hold them to be inapplicable where, as here, there are no countervailing considerations which tend to dispute the merit of the statements.

* * *

"The statements of Congressman Celler are not rash, isolated opinions that are inconsistent with the legislative history, the prevailing committee reports, or the specific tolling provisions of §5B of the Clayton Act (15 U.S.C.A. §16b). On the contrary, Mr. Celler's remarks are clarifying additions that reflect the careful diligence of a congressman who virtually lived with the problem during the course of several congressional sessions. A realistic appraisal of the circumstances justifies the attachment of weighty significance to Chairman Celler's statements, and to his expressed opinion that the prescription period would be suspended when there was fraudulent concealment which prevented discovery of the cause of action." (*City of Kansas City v. Federal Pacific,* 310 F. 2d at 280).

The legislative history requires the finding that Congress intended that the "fraudulent concealment" rule would be changed "Not at all," and that the new Clayton Act limitation would be subject to the rule of *Holmberg v. Armbrecht* that "This equitable doctrine is read into every federal statute of limitation" (327 U. S. 397).

V.

Neither the So-Called "Plain Meaning" Test nor the Distinction Between "Substantive" and "Procedural" Statutes of Limitations Can Obscure Congress' Intent That the Fraudulent Concealment Rule Apply to Section 4B of the Clayton Act.

Part IV of this brief demonstrates that Congress intended the fraudulent concealment rule to apply in private treble damage suits to which Section 4B is applicable. None of the rules of construction which appellants have argued indicates any contrary intent.

A. The "Plain Meaning" of the Statute Indicates No Intent to Bar Application of the Fraudulent Concealment Rule.

Appellants argue what they designate as the "plain meaning" of the statute and subject the wording of Section 4B to analysis to demonstrate that it was drafted with care. They then argue, to put it in the words of the unsuccessful party in *Bailey v. Glover* (21 Wall. at 346), that "the statute is imperative, admitting of no exceptions."

Suffice it to say that statutes equally "imperative" in their language have been held subject to the fraudulent concealment rule which the United States Supreme Court has said "is read into every federal statute of limitation" (*Holmberg v. Armbrecht*).

As previously noted, the statute tolled in *Bailey v. Glover, supra,* was equally "clear" on its face:

> "[N]o suit at law or in equity shall in any case be maintainable by or against such assignee . . .

> unless the same shall be brought within two years from the time the cause of action accrued for or against such assignee." (14 Stat. 526).

So, also, was the statute tolled in *Exploration Co. v. United States,* 247 U. S. 435:

> "That suits by the United States to vacate and annul any patent . . . hereafter issued shall only be brought within six years after the date of the issuance of such patents." (26 Stat. 1093).

Also, the statute tolled in *Holmberg v. Armbrecht, supra;*

> "An action, the limitation of which is not specifically prescribed in this article, must be commenced within ten years after the cause of action accrues." (N. Y. Civil Practice Act, §53).

And the statute tolled in *Glus v. Brooklyn Eastern District Terminal,* 359 U. S. 231:

> "No action shall be maintained under this chapter unless commenced within three years from the day the cause of action accrued." (45 U. S. C. §56).

The United States Supreme Court tolled each of the above statutes despite the apparent "plain meaning" of each.

The above cases and others make it clear that the fraudulent concealment rule is an equitable doctrine not dependent upon the terms of the statute of limitation. The Court of Appeals for the Tenth Circuit answered appellants' "plain meaning" argument in this way:

> "Further, defendants say that the clear language of the limitations statutes shows that Congress

did not intend any judicial tolling exception to be read into the statutes. Section 4B provides that a cause of action 'shall be forever barred unless commenced within four years after the cause of action accrued.' The argument emphasizes the phrase 'forever barred' and the word 'accrued.' The positive language of the statute is irrelevant to the application of the principle. The statutes of limitations in *Bailey v. Glover, Exploration Company, Limited, v. United States,* and *Holmberg v. Armbrecht* are just as positive and unambiguous as the statute now before the court. Yet in each of those cases the Supreme Court held that the running of the statute was tolled by fraudulent concealment." (*Public Service Co. of New Mexico v. General Electric Co.,* 315 F. 2d 306, at 311).

B. The Distinction Between "Substantive" and "Procedural" Statutes of Limitation Is of No Assistance in Determining Whether the Fraudulent Concealment Rule Applies to Section 4B.

Appellants argue that because Section 4B is a part of the Clayton Act, it should be held to be a "substantive" statute of limitation and hence not subject to tolling on equitable grounds.

Even if the "substantive-procedural" distinction had validity here, and we believe it does not, it is clear that Section 4B would be deemed a procedural statute of limitation within the framework of the "substantive-procedural" doctrine. Section 4B was enacted to bring uniformity in an area where there had been a lack of uniformity because the statutes of limitation of the several states were applied. The state statutes of limita-

tions previously applied were "procedural." There is no indication that Congress intended to change the procedural character of the limitation applicable to actions under Section 4 of the Clayton Act. Absent such indication the limitation should retain its earlier procedural character.

Express indication that Congress intended Section 4B to be a "procedural" statute of limitation may be seen from the following discussion between Representative Murray of Illinois and Representative Quigley of Pennsylvania regarding the effect of proposed Section 4B on pending treble damage actions:

> "Mr. Murray of Illinois . . . I notice they have a 6-year statute of limitations in Alabama. Assumming there is a suit pending in Alabama the cause of action having accrued four and a half years prior to the effective date of this act, then this limitation provided in section 4(B) would have no application to that litigation; is that correct?
>
> Mr. Quigley. In the circumstances the gentleman cites, the action has already been begun in the State of Alabama and will not be affected by the provisions of the pending bill.
>
> Mr. Murray of Illinois. Then am I correct in assuming that this limitation provided by this amendment is strictly a procedural limitation and has nothing to do with substance?
>
> Mr. Quigley. It was the specific purpose of the committee in reporting this bill to in no way affect the substantive rights of individual litigants. It is simply a procedural change and suggested with the

thought of setting up a uniform statute of limitations. That is the sole purpose." 101 Cong. Rec. 5131 (1955).

To quote again from the recent opinion of the Eighth Circuit:

". . . We are strongly impressed with the assertion that the statute is procedural. The very fact that the limitation period was added forty-one years after the enactment of the Clayton Act is indicative that §4B was not part of a legislative scheme creating a right. Enacted for the avowed purpose of bringing ordered uniformity out of chaos, §4B was a substitute for the admittedly procedural state statutes of limitations which could not have been borrowed in enforcement of a federal right if they were substantive." (*City of Kansas City v. Federal Pacific,* 310 F. 2d at 282).

However, without regard to whether Section 4B was intended as "procedural" or "substantive" by Congress, the courts have *not* made it a firm rule of decision that where a statute of limitation is made an integral part of the act which creates the right of action, the limitation period is not subject to tolling on equitable grounds. Prior to the ruling of the Eighth Circuit in the *Kansas City* case, the following cases had held that the distinction is not a firm rule, and that it is not an absolute bar to application of equitable doctrine;

Glus v. Brooklyn Eastern District Terminal, 359 U. S. 231 (1959);

Scarborough v. Atlantic Coast Line R. Co., 178 F. 2d 253 (4th Cir. 1949);

Osbourne v. United States, 164 F. 2d 767 (2d Cir. 1947);

Toran v. New York N. H. & H. R. Co., 108 F. Supp. 564 (D. Mass. 1952);

Fravel v. Pennsylvania R. Co., 104 F. Supp. 84 (D. Md. 1952);

Frabutt v. New York, C. & S. L. R. Co., 84 F. Supp. 460 (W. D. Pa. 1949);

Grossman v. Young, 72 F. Supp. 375 (S. D. N. Y. 1947); and

Borovitz v. American Hard Rubber Company, 287 F. 368 (N. D. Ohio 1923).

The Eighth Circuit, in the *Kansas City* case, relied on the reasoning of the *Scarborough* case; the pertinent portions of the *Scarborough* opinion follow:

> "The decisions in the *Osbourne* and *Frabutt* cases, supra, show clearly that there is a chink in the supposedly impregnable armor of the substantive time limitation of the Act. If, as those cases decided, there is one exception (war), surely the infinite variety of human experience will disclose others. . . . Fraud . . . as in the instant case, may be equally as effective in preventing one from seasonably suing on his claim; and, if permitted to succeed, it affords a continuous temptation thus to defeat the primary purposes for which Congress passed the Act.
>
> "Judge Frank in the *Osbourne* case and Judge Parker in the *Burkhardt* case, supra, have shown that the distinction between a remedial statute of limitations and a substantive statute of limitations

is by no means so rock-ribbed or so hard and fast as many writers and judges would have us believe.

. . .

"It has often been said that a primary purpose of statutes of limitations in general has been the prevention of fraud. It is freely conceded by appellee here that fraud will toll the running of the so-called remedial statute of limitations. We cannot see a distinction and a difference, so clear and so real, between the two classes of statutes of limitations—the remedial and the substantive—as to justify the courts in fully giving effect to fraud in tolling the statute in one type (remedial) and then flatly denying that effect to fraud in the other type (substantive). The ancient maxim that no one should profit by his own conscious wrong is too deeply imbedded in the frame work of our law to be set aside by a legalistic distinction between the closely related types of statutes of limitations." 178 F. 2d at 259.

Glus v. Brooklyn Eastern District Terminal, 359 U. S. 231 (1959) clearly establishes for federal courts the views of Judge Dobie set forth above. The *Glus* case involved an action under Federal Employers Liability Act which had been commenced subsequent to expiration of the applicable three year period of limitation. Plaintiff contended that the defendant was estopped from pleading the statute because the defendant had represented to the plaintiff that he had seven years in which to sue. The defendant argued that the statute of limitation was an integral part of the cause of action, that is to say, that it was "substantive"

and that as a consequence the right of action no longer existed following the three year period. The District Court and the Court of Appeals ruled that the statute could not be tolled by fraud. The United States Supreme Court unanimously reversed the judgment below and did so on the basis of the ancient rule that "No man may take advantage of his own wrong." (359 U. S. at 232).

The *Glus* case and others cited above make it clear that the distinction between "substantive" and "procedural" statutes of limitation does not afford the basis for a rigid rule against consideration of equitable factors. The only basis on which equitable doctrine can be precluded is on the basis that the legislature intended that it should not apply. We think it has been demonstrated above that no such intent on the part of Congress can be found with respect to Section 4B of the Clayton Act.

VI.

Proper and Just Enforcement of the Clayton Act Requires That the Fraudulent Concealment Rule Should Be Applied to Section 4B.

When enacting Section 4B Congress was dealing with all types of antitrust activity which could give rise to treble damage claims. Section 4B applies not only to conspiratorial price-fixing cases, which often involve fraudulent concealment, but also to other activities such as block booking, unlawful refusal to deal, and tying agreements, which are often free of fraudulent concealment. Effective and fair enforcement of the Clayton

Act with respect to all these activities, including conspiracy, requires that the more successful violator not reap the benefit of his ability to conceal the cause of action.

The proper policy considerations were well set forth by the Court of Appeals for the Eighth Circuit in the *Kansas City* case; we here set forth that portion of the opinion:

> "We have also considered the policy arguments advanced by defendants. They say that engrafting the fraudulent concealment doctrine on §4B will recreate the very confusion and chaos which Congress sought to eliminate. Additionally, they assert that because of the large volume of antitrust cases growing out of the electrical conspiracies and combinations, the ability of the courts to efficiently function and to expeditiously dispose of litigation may be impaired and that Congress was aware of this danger when §4B was enacted.
>
> These arguments fade into insignificance in the light of other considerations. We are not aware of past confusion or chaos in the federal courts resulting from application of the fraudulent concealment doctrine to antitrust actions, or for that matter to other litigation. It is to be remembered that while a plaintiff may by proper allegations of fraudulent concealment initially avoid the time limitation bar of §4B, it remains for the plaintiff to support such an allegation by competent and probative evidence. If plaintiff fails to carry the burden in this respect, the judicial processes are

such as to insure orderly and efficient administration of justice, e.g., *Moviecolor Limited v. Eastman Kodak Co., supra,* 288 F. 2d 80; *Burnham Chemical Co. v. Borax Consolidated, supra,* 170 F. 2d 569; *Gaetzi v. Carling Brewing Co., supra,* 205 F. Supp. 615; *Dovberg v. Dow Chemical Co., supra,* 195 F. Supp. 337.

While lack of uniformity in the state statutes of limitations was undeniably a prime factor which motivated Congress to enact §4B, our careful consideration of all phases of the instant controversy drives us irresistibly to the conclusion that Congress was equally concerned with efficient enforcement of the Clayton Act which certainly cannot be accomplished if the statute is given a literal construction. We are not persuaded to believe that Congress meant to proscribe and outlaw conspiracies and combinations in restraint of trade, only to reverse itself by enacting a statute of limitations that would reward successful conspiractors. When the antitrust laws are violated, the wrongdoers who are successful in cloaking their unlawful activities with secrecy through cunning, deceptive and clandestine practices should not, when their machinations are discovered, be permitted to use the shield of the statute of limitations to bar redress by those whom they have victimized." (*City of Kansas City v. Federal Pacific,* 310 F. 2d 271 at 283-284).

Conclusion.

Effective enforcement of the Clayton Act, as well as sound equitable doctrine, require that the fraudulent concealment rule apply to Section 4B. It is demonstrated herein that Congress intended its application.

It is highly important that this Court not adopt a rule which would give defendants who are successful in fraudulently concealing their unlawful conduct the benefit of their unlawful activity.

The District Court herein correctly held that the fraudulent concealment rule applies to Section 4B, and its decision should be affirmed.

Respectfully submitted,

May 27, 1963.

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Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

R. F. OUTCAULT, JR.